IN THE

Supreme Court of the United States

OCTOBER, 1975

No. 75-1448

COMMISSIONER OF THE DEPARTMENT OF CORRECTIONAL SERVICES; J. EDWIN LAVALLEE, Superintendent of the Clinton Correctional Facility; VINCENT R. MANCUSI, Superintendent of the Attica Correctional Facility; JOHN L. ZELKER, Superintendent of the Green Haven Correctional Facility,

Petitioners,

against

MASIA A. MUK MUK, also known as SYLVESTER CHOLMONDELEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[redacted]

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BRIEF FOR PETITIONERS

Petitioners, the Commissioner of the Department of Correctional Services; J. Edwin LaVallee, Superintendent of the Clinton Correctional Facility; Vincent R. Mancusi, Superintendent of the Attica Correctional Facility and John L. Zelker, Superintendent of the Green Haven Correctional Facility; pray that a writ of certiorari issue to

review a decision of the United States Court of Appeals for the Second Circuit in the case of *Masia A. Muk Muk also known as Sylvester Cholmondeley* v. *Commissioner of the Department of Correctional Services; J. Edwin LaVallee, Superintendent of the Clinton Correctional Facility; Vincent R. Mancusi, Superintendent of the Attica Correctional Facility and John L. Zelker, Superintendent of the Green Haven Correctional Facility* which affirmed in part and reversed in part a judgment of the District Court with directions to accept an amended complaint.

Opinions Below

The decision of the Court of Appeals which petitioners seek to review is not yet reported and was dated January 13, 1976. The opinion of the Court of Appeals is reproduced as Appendix A. The decision of the District Court, which was affirmed in part and reversed in part by the Court of Appeals is reported at 369 F. Supp. 245 (January 14, 1974). The opinion of the District Court is reproduced as Appendix B.

Jurisdiction

The jurisdiction of this Court rests on 28 U.S.C. § 1254 (1). The decision of the Court of Appeals was handed down January 13, 1976.

Questions Presented

Is permitting a plaintiff to file a fourth complaint naming additional defendants and changing the capacities and potential liabilities of the original defendants within the discretion of the District Court? That discretion not having been abused may the Court of Appeals permit the filing of another complaint adding new defendants?

Statement of the Case

This action was commenced on August 14, 1970, more than five years ago, when respondent, through three attorneys filed a 12 paragraph complaint dealing with three counts of allegedly improper prison discipline against him at Green Haven Correctional Facility during 1970.

On December 17, 1970, an amended complaint was filed dealing in greater detail with respondent's disciplinary infractions during 1970. The amended complaint was signed by the same three attorneys and, as did the first complaint, named as defendant only John L. Zelker, Warden of Green Haven Prison. An answer was filed January 4, 1971.

Respondent was permitted, on October 15, 1971, to file a second amended complaint. This document made a quantum leap from the modest dimensions of its two predecessors and purported, in 126 separate paragraphs, to challenge virtually every disciplinary action of respondent's prison record. The essential purpose of the complaint was to obtain the restoration of all the good behavior credits that respondent had lost. He also sought damages. It is this complaint that was the subject of the appeal to the Second Circuit. It, for the first time, names as defendants, in addition to Mr. Zelker, an unidentified Commissioner of the Department of Correctional Services, J. Edwin LaVallee, Superintendent of the Clinton Correctional Facility and Vincent R. Mancusi, Superintendent of the Attica Correctional Facility. Respondent was then represented by Elizabeth M. Fisher, one of the three original attorneys. These defendants were named solely in their official capacities.

On November 23, 1971, the petitioners' motion to dismiss for improper venue and on the ground that they were not parties under the doctrine of *respondeat superior* was denied. The petitioners' answer to the second amended complaint was filed on February 16, 1972. They made a

motion to dismiss for failure to prosecute, returnable October 9, 1972. On the return date, respondent's attorney indicated that she was ready to proceed to trial, pending the discovery of certain documents believed to be in the possession of the Department of Correctional Services.

In a motion returnable October 23, 1973 and then adjourned to November 5, 1973, petitioners moved for summary judgment. On October 30, 1973, respondent filed his motion for leave to add parties, to amend again the complaint for a third time and for summary judgment. This third amended complaint did not list the official capacities of the defendants.

In a decision dated January 14, 1974 (and by order dated February 14, 1974), the District Court (BONSAL, J.), granted petitioners' motion for summary judgment because insofar as respondent was seeking the restoration of good time credits, he was required to first exhaust his state remedies* and insofar as he was seeking damages and an injunction, "correctional authorities have wide discretion in matters of internal prison administration and . . . reasonable action within the scope of this discretion does not violate a prisoner's constitutional rights". The Court also found that the respondent had not alleged "that the named defendants personally played any part in the alleged denial of his constitutional rights" 369 F. Supp. at 249.

The Court refused to authorize a third amended complaint and leave to add parties stating at 362 F. Supp. at 250:

> "In view of the prior three complaints and the dilatory prosecution of this action by plaintiff, the court will not delay this action's disposition further by permitting another complaint to be filed. Accordingly, plaintiff's motion for leave to add parties, to amend the complaint, and for summary judgment is denied."

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* In May, June and early July 1973, the Department of Correctional Services made a thorough review of respondent's record and in an exercise of discretion, restored a sufficient amount of good time to permit respondent conditional release on January 2, 1975.

A notice of appeal dated February 13, 1974 was filed on March 15, 1974. At this time, appellant was represented by Elizabeth M. Fisher and an additional attorney, Jesse Berman. Respondent did not perfect his appeal by filing his brief and the joint appendix until on or about July 21, 1975, over sixteen months after the filing of the notice of appeal. On the appeal, respondent was represented again by Ms. Fisher and two new attorneys.

On January 13, 1976, the United States Court of Appeals for the Second Circuit affirmed the District Court's granting of summary judgment with respect to certain of respondent's allegations and reversed and remanded for a trial with respect to other allegations. The Court affirmed the District Court's denial of the right to file another amended complaint as being within the court's discretion except with respect to the naming of additional defendants.

In affirming the exercise of the District Court's discretion denying the filing of a fourth complaint, the Court of Appeals stated (A. 3a-4a):

> "The factor of time is not insignificant in these matters. For the very reasons that lead legislatures to enact statutes of repose, courts must acknowledge the special difficulties involved in trying to find truth when old cases come to untimely trial. In the prison setting, with a multitude of persons under custody and a continuing series of disciplinary problems recurring in various forms, it is not easy to recall the *dramatis personae* who enacted each incident. Memory tends to become kaleidoscopic instead of focusing upon the single scene or even the particular inmate."

In permitting an amended complaint to be filed naming additional defendants, the Court stated, A. 6a, n. 5:

> "The District Court made an alternative holding in its grant of summary judgment that the plaintiff had failed to allege or show the requisite degree of personal responsibility on the part of the named wardens, in that the allegations were not specific enough. It is undisputed that certain incidents occurred at times when none of the named defendants was at the relevant institution, and on these incidents the summary judgment grant was entirely appropriate. However, the names of the persons who were in charge of the relevant prisons during the time petitioner was confined therein are of public record, and the plaintiff should be permitted to amend his complaint to name them as defendants. Furthermore, both sides seem to assume that the Commissioner named in the complaint is Commissioner McGinnis. Since there are no problems of notice or fairness involved in this designation, we assume that the Commissioner designated was Mr. McGinnis, for a § 1983 action is a personal one and does not run with the office. Plaintiff should be permitted to amend his complaint to specifically designate Mr. McGinnis as a named defendant."

Reasons Why Certiorari Should be Granted.

This Court should determine whether permitting a plaintiff to file a fourth complaint naming additional defendants and changing the capacities and potential liabilities of the original defendants is within the discretion of the District Court and whether that discretion not having been abused, the Court of Appeals may permit the filing of yet another complaint adding new defendants.

Other Circuits have held that a motion to drop or add a party pursuant to Rule 21 of the Federal Rules of Civil Procedure is addressed to the discretion of the District Court. *United States* v. *Wyoming National Bank of Casper,* 505 F. 2d 1064 (10th Cir. 1974); *Standard Industries, Inc.* v. *Mobil Oil Corp.,* 475 F. 2d 220 (10th Cir. 1972) cert. den. 414 U.S. 829; *Weaver* v. *Marcus,* 165 F. 2d 862 (4th Cir. 1948). The exercise of the District Court's discretion can be reversed on appeal only where the District Court clearly abused its discretion. *Weaver* v. *Marcus, supra.*

As stated in 7 Wright & Miller, Federal Practice and Procedure, § 1688:

> "Rule 21 specifically permits a change in parties 'at any stage in the action.' However, the Court typically will deny a request that comes so late in the litigation that it will delay the case or prejudice any of the parties to the action."
>
> • • •
>
> "The grant or denial of a motion to bring in or to drop a party lies in the discretion of the judge. . . . The trial court's exercise of discretion will not be disturbed on appeal unless an abuse is shown." (Footnotes omitted).

See 3A, Moore, Federal Practice ¶ 21.04[1].

The Court of Appeals for the Second Circuit provided no cogent reasons outlining how the District Court abused its discretion in not allowing the addition of new parties and by not allowing a charge in the capacities of the original defendants through the filing of a new complaint other than to state in N. 5, A. 6a that the names of those defendants are on public record. Respondent was always represented by at least one attorney and usually by three. Yet, notwithstanding the fact that those defendants' names were on public record, respondent made no attempt to name them until he attempted to file a fourth complaint some three years after the filing of the first complaint. Nor did petitioner ever name the original defendants in their individual capacities.

The Court of Appeals agreed that a fourth complaint should not be permitted for purposes of repose and recognized that memory of particular incidents and individuals must necessarily fade when "old cases come to untimely trial." The same reason is applicable with equal force to respondent's attempt to add new parties defendant and to change the capacities of the original defendants by his fourth amended complaint. The District Court did not abuse its discretion in denying leave to add new parties and to amend the complaint. The Court of Appeals having reversed the District Court without cogent reason has conflicted with opinions in the Tenth and Fourth Circuits.

Insofar as a motion to add parties or change the capacities of parties under Rule 21 bears a relationship to Rule 15(a) of the Federal Rules of Civil Procedure,* see 3A Moore, Federal Practice, ¶ 21.02, the decision of the Court of Appeals conflicts with the holding of this Court in

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* Neither respondent nor the courts below ever explained whether the motion to add new parties was being considered under Rule 21 or Rule 15(a). Changing capacities of parties to hold them personally liable can be achieved only by Rule 15.

Zenith Radio Corp. v. *Hazeltine Research, Inc.*, 401 U.S. 321, 330 (1971), where the Court stated:

> "It is settled that the grant of leave to amend the pleadings pursuant to Rule 15(a) is within the discretion of the trial court. *Foman* v. *Davis*, 371 U.S. 178, 182 (1962) (datum)."

In *Foman* v. *Davis, supra,* the Court stated at 182:

> "In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be 'freely given.' Of course, the grant and denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion, it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules."

Although new parties may be added pursuant to Rule 21, the same considerations apply as with the amending of a complaint pursuant to Rule 15(a). Since the Court of Appeals for the Second Circuit here has permitted the adding of new defendants without providing a satisfactory reason for overruling the District Court's denying permission while at the same time the Court of Appeals affirmed the District Court's refusal to allow a new complaint, when the District Court denied both for the same reasons, the decision of the Court conflicts with decisions of this Court and with other Circuits.

Insofar as the third proposed amended complaint seeks to change the capacities of the originally named defendants by deletion from the caption of their official titles, the Court

of Appeals inadvertently and necessarily exposes these parties to potential personal money liabilities more than 5½ years after the original complaint was filed. The District Court in denying permission to file the third amended complaint which would have radically changed the original defendants' capacities and potential liabilities, properly exercised its discretion. The Court of Appeals in reversing this exercise of discretion without even stating that it was an abuse of discretion perhaps inadvertently treated the change of capacities like a formality under Rule 25(d) of the Federal Rules of Civil Procedure involving "official capacity." That Rule, however applies solely where the public officer is sued in his official capacity. Insofar as the Court of Appeals has permitted the respondent to name the original defendants in their individual capacities, it has overruled the District Court's exercise of its discretion without cogent reason.

CONCLUSION

Petitioner's application for certiorari should be granted and the decision of the Court of Appeals summarily reversed or plenary review granted.

Dated: New York, New York, April 9, 1976.

Respectfully submitted,

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APPENDIX A

Decision of the United States Court of Appeals for the Second Circuit, dated January 13, 1976.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 210—September Term, 1975.

(Argued November 12, 1975 Decided January 13, 1976.)

Docket No. 74-1504

MASIA A. MUKMUK,
also known as SYLVESTER CHOLMONDELEY,

Appellant,

v.

COMMISSIONER OF THE DEPARTMENT OF CORRECTIONAL SERVICES; J. EDWIN LAVALLEE, Superintendent of the Clinton Correctional Facility; VINCENT R. MANCUSI, Superintendent of the Attica Correctional Facility; JOHN L. ZELKER, Superintendent of the Green Haven Correctional Facility,

Appellees.

Before:

FEINBERG, GURFEIN and VAN GRAAFEILAND,

Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York (Bonsal, *J.*), granting defendants' motion for summary judgment on the

grounds that practices complained of were not unconstitutional and, alternatively, that officials sued were not specifically implicated in allegedly unconstitutional actions. The Court of Appeals held that the case presented triable issues of fact.

The judgment is affirmed in part, reversed in part, and the cause remanded for trial.

DAVID J. FINE, New York, N.Y. (Elizabeth M. Fisher, David Rosenberg, and Paul, Weiss, Rifkind, Wharton & Garrison, New York, N.Y., of counsel), *for Appellant.*

DAVID L. BIRCH, Deputy Assistant Attorney General of the State of New York (Louis J. Lefkowitz, Attorney General, and Samuel A. Hirshowitz, First Assistant Attorney General, of counsel), *for Appellees.*

GURFEIN, *Circuit Judge:*

The plaintiff, Masia Mukmuk, is a Black Muslim leader who spent 15 years in New York state prisons.[1] From his own allegations in his civil rights complaint, he was an activist in prison. One cannot help but read between the lines that he has been a thorn in the side of prison officials during most of his prison life. Such activism tends to elicit a reactive use of power. To persons in authority in the prison scene that power is readily available. The serious question raised is whether the boundaries of permissible sanctions by the corrections officers were crossed and the constitutional rights of Mukmuk under the Eighth, Fourteenth and First Amendments violated.

[1] He was released on parole in January, 1975.

This is a § 1983 action which has long endured upon the docket of the District Court for the Southern District of New York with but little movement. The action was begun in August 1970. The complaint was twice amended. In October 1973, a motion for summary judgment was made by the defendants, who are the Commissioner of the Department of Correctional Services; J. Edwin LaVallee, Superintendent of the Clinton Correctional Facility; Vincent R. Mancusi, Superintendent of the Attica Correctional Facility; and John L. Zelker, Superintendent of the Green Haven Correctional Facility.[2]

The plaintiff countered with his own motion for summary judgment and with a motion for leave to file yet another amended complaint, which was denied as coming too late. Judge Bonsal granted the defendants' motion for summary judgment, generally upon the ground that what Mukmuk alleged did not sink to the indignity of constitutional violation. 369 F. Supp. 245 (S.D.N.Y. 1974). Much as we sense provocation by the plaintiff, we must, nonetheless, hold that he has alleged triable issues of fact under existing precedents which defeat a summary judgment. We affirm, however, the denial of the right to file another amended complaint as being in the court's discretion (except with respect to the naming of additional defendants, see note 5 *infra*). The factor of time is not insignificant

[2] Earlier defense motions to dismiss for lack of prosecution were denied. Various other procedural moves are described in the opinion below. *Mukmuk* v. *Commissioner of Dep't of Correctional Services,* 369 F. Supp. 245 (S.D.N.Y. 1974). A prayer for restoration of good time credits was dismissed as in the nature of a petition for habeas corpus without exhaustion of state remedies. See *Preiser* v. *Rodriguez,* 411 U.S. 475 (1973). We agree.

in these matters. For the very reasons that lead legislatures to enact statutes of repose, courts must acknowledge the special difficulties involved in trying to find truth when old cases come to untimely trial. In the prison setting, with a multitude of persons under custody and a continuing series of disciplinary problems recurring in various forms, it is not easy to recall the *dramatis personae* who enacted each incident. Memory tends to become kaleidoscopic instead of focusing upon the single scene or even the particular inmate.

Since we must reverse the summary judgment, we shall sketch the allegations that lead us to this course.

Appellant was sentenced, on a plea of guilty, on June 29, 1960 to concurrent terms of five to ten years on two burglary and larceny convictions, to be served consecutively to a term of ten to twenty years on a rape conviction. Upon sentencing he was sent to the Elmira Reception Center, and thence to various New York state prisons.[3] On June 12, 1972, the Appellate Division, Second Department, directed that his three sentences run concurrently.

Mukmuk was held in solitary confinement or keeplock for over seven years out of a total prison life of fifteen years. Much of the confinement was avowedly punitive,

[3] In September 1960, he was sent from the Elmira Reception Center to Auburn Prison. On September 13, 1962, he was transferred to Clinton Prison where he remained until he was transferred to Attica Prison in February 1965. In March 1966, he was transferred to Green Haven. In February 1967, he was transferred back to Clinton Prison. In February 1968, he was returned to Auburn. In May 1969, he went back to Attica. In February 1970, he was transferred to Green Haven Prison. Later that year he was transferred back to Clinton where he was incarcerated when he filed his second amended complaint in May 1971. We have given this history to put the violations complained of in their proper setting of time and locale.

for Mukmuk was a troublemaker by his own averment. He alleges most directly four or five incidents for which he seeks redress.[4]

I

Appellant claims damages for a punishment of twelve days of solitary confinement imposed on him while at Green Haven in January 1967 for the possession of "inflammatory writings" and for setting up a school for Muslims. As the Supreme Court indicated in *Cooper* v. *Pate*, 378 U.S. 546 (1964), and as this circuit held in *Pierce* v. *LaVallee*, 293 F.2d 233 (2 Cir. 1961), prisoners retain their First Amendment rights relating to religious freedom. See also *Kahane* v. *Carlson*, No. 75-2088, slip op. 715, 719-21 (2 Cir. Nov. 26, 1975). In 1964 we gave the New York Corrections authorities more time to propose rules for the regulation of Black Muslim prisoners, while indicating that as a religious group they possessed First Amendment rights even in prison. *Sostre* v. *McGinnis*, 334 F.2d 906 (2 Cir.), *cert. denied*, 379 U.S. 892 (1964). To the extent that the literature here involved may have been religious in character, the Warden had received sufficient warning from the courts

[4] There is also a generalized claim of alleged religious discrimination against appellant because he has been a Black Muslim since the fall of 1961. In addition to an allegation that he was put in segregation in January 1967 because he was setting up a school for Muslims, which is discussed in Part I, *infra*, the only incidents cited in support of the theme occurred in 1961 at Auburn Prison and 1962 and early 1963 at Clinton Prison. His 1962 segregation at Clinton Prison lasted until February 20, 1965.

His claims of alleged discrimination thereafter were apparently based not on his religious beliefs but on his political beliefs and on his being a "Black Man." While a bare allegation of religious discrimination might not be enough to require a trial, appellants may present evidence on the subject since we are remanding for trial on other issues.

by 1967 that it was unconstitutional to impose punishment for its possession. If it was, indeed, religious literature, the warden may be liable in damages, assuming that a sufficient personal responsibility is shown.[5] *Johnson* v.

[5] The District Court made an alternative holding in its grant of summary judgment that the plaintiff had failed to allege or show the requisite degree of personal responsibility on the part of the named wardens, in that the allegations were not specific enough. It is undisputed that certain incidents occurred at times when none of the named defendants was at the relevant institution, and on these incidents the summary judgment grant was entirely appropriate. However, the names of the persons who were in charge of the relevant prisons during the time petitioner was confined therein are of public record, and the plaintiff should be permitted to amend his complaint to name them as defendants. Furthermore, both sides seem to assume that the Commissioner named in the complaint is Commissioner McGinnis. Since there are no problems of notice or fairness involved in this designation, we assume that the Commissioner designated was Mr. McGinnis, for a § 1983 action is a personal one and does not run with the office. Plaintiff should be permitted to amend his complaint to specifically designate Mr. McGinnis as a named defendant.

Moreover, as we noted in *Wright* v. *McMann*, 460 F.2d 126, 135 (2 Cir. 1972), under New York State law the warden of an institution is (and was) specifically responsible for the condition of strip cells and other disciplinary units in his institution. In conjunction with evidence at trial of Warden McMann's actual knowledge of the conditions of the cell, this was held a sufficient predicate for § 1983 liability. Although in *Sostre* v. *McGinnis*, 442 F.2d 178, 189 (2 Cir. 1971) (*en banc*), *cert. denied*, 404 U.S. 1049, 405 U.S. 978 (1972), we refused to hold the Commissioner liable where there was no evidence that he knew of the warden's improper motives in punishing Sostre, in *United States ex rel. Larkins* v. *Oswald*, 510 F.2d 583 (2 Cir. 1975), we held that a statutory requirement that the warden report to the Commissioner the status of all inmates in solitary confinement every five days met the personal responsibility requirements for suit under § 1983. It appears that the reporting requirement did not come into law until 1970, with the repeal of former §§ 137-140 of the Correction Law. We note, however, that § 114-a of the New York Correction

(footnote continued on following page)

Glick, 481 F.2d 1028, 1033-34 (2 Cir.), *cert. denied*, 414 U.S. 1033 (1973). If the literature was exclusively nonreligious, punishment for its mere possession may be unconstitutional under present standards. See *Sostre* v. *McGinnis*, 442 F.2d 178, 202-03 (2 Cir. 1971) (*en banc*), *cert. denied*, 404 U.S. 1049, 405 U.S. 978 (1972); *United States ex rel. Larkins* v. *Oswald*, 510 F.2d 583, 588 (2 Cir. 1975). But it does not necessarily follow that the warden is liable in damages; it might be possible for him to establish that, under the law as it existed in 1967, his actions were in "good faith reliance on a pre-existing procedure." See *Cox* v. *Cook*, 420 U.S. 734, 736 (1975), discussed *infra*; *Pierson* v. *Ray*, 386 U.S. 547, 557 (1967). These issues preclude the grant of summary judgment.[6]

II

Appellant seeks damages for a "keeplock" (in which an inmate is locked in his cell 24 hours a day) of over eight months for his refusal to take an achievement test while at Attica Prison in 1969. Appellant's proffered reason for his refusal to take the test was his desire to protest the absence of a Black Studies program. There is no allegation that appellant was required to take the test because of discrimination against him. Since the test requirement was reasonable in light of the institution's program for rehabilitation, his refusal to participate did not immunize

(footnote continued from preceding page)

Law, in effect since 1941, requires the warden to keep a daily record of infractions and punishments imposed, and requires that "such record . . . be kept open at all times to the examination of the commissioner of correction." We do not decide whether *Larkins* would apply to a period before 1970.

[6] See *infra* for discussion of a possible extension of non-retroactivity to substantive as well as procedural matters in certain circumstances covered by this complaint.

him from punishment. See *Rutherford* v. *Hutto,* 377 F. Supp. 268, 273 (E.D. Ark. 1974).

In *Sostre* v. *McGinnis, supra,* 442 F.2d at 194, we said that we would not deny to prison authorities the right to determine the length of punitive confinement when the inmate fails to obey valid prison regulations. In *Wright* v. *McMann,* 460 F.2d 126, 134 (2 Cir.), *cert. denied,* 409 U.S. 885 (1972), we treated *Sostre,* however, as holding merely that the federal courts should be "chary in entertaining inmate petitions claiming unconstitutionally disproportionate punishment . . . ." While not every such claim requires a trial, under the facts of this case we are inclined against summary judgment. See also *LaReau* v. *MacDougall,* 473 F.2d 974, 978 n.6 (2 Cir. 1972), *cert. denied,* 414 U.S. 878 (1973).

III

Appellant alleges that on March 16, 1965, at Attica Prison, he was charged with insolence and placed in the segregation unit for one year as a result (Second Amended Complaint ¶¶ 51-52). Appellant's brief acknowledges that he was also charged and found guilty of taking some brown wrapping paper without authorization, but alleges that he was unaware of a rule prohibiting this behavior. Although there are circumstances which might justify such an extreme punishment for such a minor offense, we are dealing with a grant of summary judgment. The appellant may prove at trial that the punishment was so discriminatory as to be constitutionally excessive. Of course, at trial, the prison authorities would be permitted to show that the seemingly harsh punishment was justified, in part because of appellant's cumulative record of disciplinary problems. There are issues of fact to be tried.

IV

Appellant alleges that the ten months of punitive segregation imposed on him in February 1967 after an interview with Deputy Warden DeLong of Clinton Prison (not named as a defendant) was unconstitutional (Second Amended Complaint ¶¶ 59-62). Mr. DeLong, in an affidavit dated May 17, 1967, swore that appellant, upon his transfer to Clinton Prison from Green Haven, was interviewed and

> "flatly refused to cooperate with the Administration and observe the rules and regulations of the institution (copy of which had been furnished). Subsequent interviews have revealed no change in his attitude. Inasmuch as he has preached black power and the violent overthrow of the United States Government and intends to continue doing so, it is necessary to continue him in an area where a general prison disturbance can be avoided."

These statements have not been controverted by sworn testimony and there is no issue of fact. We think that Judge Bonsal properly granted summary judgment to the extent of the allegations of paragraphs 59 through 62. We have held it permissible to keep a prisoner in segregation until he agrees to abide by the rules of the institution. *Sostre* v. *McGinnis, supra,* 442 F.2d at 187, 192.

V

Moreover, in addition to the four incidents highlighted by appellant, we must also remand the case for trial in light of earlier decisions of this circuit, to determine whether plaintiff's confinement in "strip cells" at Clinton State Prison between 1963 and 1965, and at Auburn Prison in 1961 and 1962, amounted to cruel and unusual punishment under the Eighth Amendment. See *Wright* v. *Mc-*

Mann, supra, 460 F.2d at 129-30; *LaReau* v. *MacDougall, supra,* 473 F.2d at 977-78.

Cox v. *Cook, supra,* decided that new court decisions on *procedural* matters affecting prisoners are not to be applied retroactively. See also *Wolff* v. *McDonnell,* 418 U.S. 539 (1974). In the context of tort liability under the Civil Rights Act, the Supreme Court said in *Pierson* v. *Ray, supra,* 386 U.S. at 557, "[w]e agree that a police officer is not charged with predicting the future course of constitutional law." While there are instances of gross abuse to human dignity so shocking to the conscience as to require no judicial pronouncement for their general recognition, see *Rochin* v. *California,* 342 U.S. 165, 172 (1952), there are other types of deprivation of rights which may be recognized as unconstitutional for § 1983 purposes only when they are judicially so declared. The quality of the wrong is both a question of fact and an ingredient of the measure of liability.

The conception of what is meant by "cruel and unusual punishment" in the language of the Eighth Amendment has been evolving in the past two decades. See Judge Friendly's discussion in *Johnson* v. *Glick, supra,* 481 F.2d at 1031-33.[7] No man can say today what the Eighth Amendment may mean tomorrow.[8] If the Eighth Amendment is

[7] The content of the Eighth Amendment has been incorporated into the Fourteenth Amendment. *Robinson* v. *California,* 370 U.S. 660 (1962). Commentators have recently doubted "whether *Robinson* really presented an Eighth Amendment issue." Schwartz & Wishingrad, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the* Weems v. United States *Excessive Punishment Doctrine,* 24 Buffalo L. Rev. 783, 802 (1975).

[8] In *Wilkerson* v. *Utah,* 99 U.S. 130, 135-136 (1878), the Court said: "Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishment shall not be inflicted."

governed by natural law, that law is itself chameleon in character. It reflects an evolving view of society as interpreted by the Supreme Court.[9] Nevertheless, when we deal with situations involving "cruel and unusual punishment" one may argue that if the "violation" charged is not so shocking to the conscience as to be readily perceived, it is not an Eighth Amendment violation in any event. See *United States ex rel. Hyde* v. *McGinnis,* 429 F.2d 864 (2 Cir. 1970). And if it is so perceived, there is no need to declare it in advance of imposing liability. When we deal with violations of other constitutional rights of prisoners, however, there may be a sharper distinction between conduct that was allowable at the time and conduct that had already been declared beyond the limits of disciplinary prerogatives. The Supreme Court has now said that in a § 1983 case "[a] compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's *clearly established* constitutional rights that his action cannot reasonably be characterized as being in good faith" (emphasis added). *Wood* v. *Strickland,* 420 U.S. 308, 322 (1975).

It is the guardian of discipline who becomes the tort-feasor defendant when a civil rights suit is brought. The public officer may inflict harm which is a violation of a constitutional prohibition without conscious plan or illicit purpose. See *United States ex rel. Schuster* v. *Vincent,* 524 F.2d 153, 160 (2 Cir. 1975). But the test of liability ought not ignore entirely the *mores* of the times or even

[9] In the words of Chief Justice Warren: "The Amendment must draw its meaning from the evolving standards of decency that mark the progres sof a maturing society." *Trop* v. *Dulles,* 356 U.S. 86, 101 (1958). See also *Weems* v. *United States,* 217 U.S. 349, 368 (1910); and Judge Kaufman's comments in *Sostre* v. *McGinnis, supra,* 442 F.2d at 191.

Decision of the United States Court of Appeals for the Second Circuit, dated January 13, 1976.

the particular *mores* of prison guards, untrained in the lawyers' view of life. The growth of constitutional protection in recent years in the area of First, Fourth and Fifth Amendment rights is illustrative of situations where retroactive application of newly declared doctrine may be unfair. See *Sostre* v. *McGinnis, supra,* 442 F.2d 178. It will be for the district court to determine, in the first instance, the standards to apply in light of the evidence.

We do not reverse the discretionary denial of leave further to amend *except* with respect to the naming of additional defendants. See footnote 5, *supra.*

Affirmed in part; reversed in part, with directions to accept an amended complaint limited as required by this opinion.

APPENDIX B

Decision of the United States District Court for the Southern District of New York, dated January 14, 1974.

Elizabeth M. Fisher, Cambridge, Mass., for plaintiff.

Louis J. Lefkowitz, Atty. Gen., New York City, for defendants; David R. Spiegel, Deputy Asst. Atty. Gen., of counsel.

MEMORANDUM

BONSAL, District Judge.

Defendants move pursuant to Rule 12(c), Fed.R.Civ.P., for judgment on the pleadings, or in the alternative, for summary judgment pursuant to Rule 56, Fed.R.Civ.P. Plaintiff has cross moved for leave to add parties, to amend the complaint, and for summary judgment.

Plaintiff, Sylvester Cholmondeley, also known as Masia Mukmuk, is presently confined to Great Meadow Correctional Facility pursuant to a judgment of conviction in Queens County Court on June 29, 1960. He was convicted for the crimes of rape in the first degree, burglary in the third degree, and robbery in the third degree, for which he was sentenced to serve the following terms of imprisonment: 10 to 20 years on the rape conviction, 5 to 10 years on the burglary conviction, and 5 to 10 years on the robbery conviction. The sentences on the burglary and robbery convictions are concurrent with each other, but consecutive to the sentence on the rape conviction.

Plaintiff instituted this action pursuant to 42 U.S.C. § 1983 on August 14, 1970. Jurisdiction is claimed under 28 U.S.C. § 1343. His original complaint (the "August 14, 1970 complaint"), filed while he was an inmate at Green

Haven Correctional Facility, alleged that when he was transferred to Green Haven on February 7, 1970, some books and magazines were "confiscated by agents of defendant Zelker [Superintendent of Green Haven Correctional Facility from June 11, 1970 to March 29, 1972] and have not been returned," and that he was improperly disciplined on July 28, 1970 by being placed in solitary confinement for teaching karate in the exercise yard. He sought an injunction ordering the defendant to return to him his personal writings, books, and magazines and to release him from solitary confinement. Plaintiff moved by order to show cause for a preliminary injunction. However, the problems for which his motion was presented were adjusted by agreement between the parties, and the motion was accordingly dismissed on consent and without prejudice by Judge Frankel on August 21, 1970.

On December 17, 1970, plaintiff filed an amended complaint (the "December 17, 1970 complaint") setting forth approximately 15 occasions on which he was punished for prison-rule infractions during the year 1970, usually by being "keeplocked" in his cell for short periods ranging up to 20 days, by being placed in solitary confinement, or by the loss of "good time" or recreation privileges. He alleged that these disciplinary measures were taken as a result of his espousal of the Black Muslim religion while in prison.

By notice of motion filed May 14, 1971, plaintiff petitioned the court to adjourn until early fall of 1971, the consolidated trial on the merits and hearing on the application for a preliminary injunction, originally noticed for May 19, 1971, and also petitioned for leave to file an amended complaint. By order dated May 17, 1971 and filed October 15, 1971, Judge Motley denied without prejudice the application for a preliminary injunction and granted the plaintiff's motion for leave to file an amended complaint.

On October 15, 1971, plaintiff filed an amended complaint (the "October 15, 1971 complaint")—toward which the defendants' present motion is directed—in which he allges that he has been mistreated by prison authorities in connection with rule infractions beginning with his first confinement in New York State prison on August 29, 1960 and continuing to the present. His complaint sets forth approximately 80 such instances. Alleging that these disciplinary measures constituted a denial of his constitutional rights, he seeks a "final injunction against the wrongs complained of in this Complaint," a declaratory judgment and restoration of the good time which he claims to have lost by reason of the alleged mistreatment by prison authorities, and damages in the amount of $100,000 for "the cruel and unusual punishment to which he has been subjected," plus costs and attorneys fees. This complaint does not allege that he has previously exhausted his State remedies with respect to these claims.

On November 1, 1971, defendants filed a motion to dismiss the October 15, 1971 complaint on the grounds that venue in the Southern District of New York was improper and that the defendants were improperly named in the complaint under the doctrine of *respondeat superior*. Judge Brieant denied the motion by endorsement on November 23, 1971, and defendants filed their answer on February 16, 1972.

There followed an interlude during which no action was taken on the case until September 22, 1972, when defendants moved to dismiss for failure to prosecute. In opposition to this motion, plaintiff's counsel filed an affidavit in which she stated that "the period of dormancy in this case . . .

coincided with certain developments in the plaintiff's situation that made the pursuit of legal redress an unwise tactic." On the return date of the motion, plaintiff's counsel advised the court that she was ready to proceed with the action, pending the discovery of certain documents which she believed to be in the possession of the Department of Correction. On October 30, 1972, the court denied the motion to dismiss and set December 1, 1972 as the date for the submission of a Pretrial Order.

On March 16, 1973, plaintiff moved for a preliminary injunction seeking to enjoin the defendants from transferring the plaintiff to a rehabilitation program and ordering that the plaintiff be placed in federal protective custody pending the disposition of this action. By memorandum filed on April 20, 1973, the motion for a preliminary injunction was denied and the parties were directed to file a Pretrial Order at the earliest possible time.

On March 28, 1973, plaintiff filed a motion seeking discovery of all disciplinary reports, records, and other documents pertaining to the plaintiff, including daily journals and segregation log books from each of the prisons at which plaintiff had been confined. This motion was referred to Magistrate Jacobs, and a hearing was held on April 3, 1973. At the hearing, it was agreed that the defendants would produce any writings from their files which made specific reference to the plaintiff; any writings, or references to writings, by the plaintiff; any correspondence between the plaintiff and Department of Correction officials; any writings which made reference to the plaintiff as a Black Muslim or to Muslims generally at any institution where plaintiff was at any time confined; and any writings referring in any way to any policy at any institution with respect to Muslims. In addition, defendants agreed to

make available for inspection the segregation log books and daily journals referring to the days in which the plaintiff was in segregation or in which he was the subject of disciplinary action. Defendants were not required to produce any documents reflecting personal opinions or work product in connection with litigation. As a result of this agreement, the plaintiff's motion was withdrawn.

In spite of the attempts by the Magistrate to work out a Pretrial Order and despite the volume of discovery material produced, no Pretrial Order has been filed. On October 5, 1973, defendants filed the present motion for judgment on the pleadings or for summary judgment. The motion was originally made returnable on October 23, but it was later adjourned to November 5, 1973. On October 30, 1973, plaintiff filed his motion for leave to add parties, to amend the complaint, and for summary judgment.

[1] With respect to their motion for judgment on the pleadings, defendants contend that under the Supreme Court's recent decision in Preiser v. Rodriguez, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973), a civil rights action seeking the restoration of good conduct time credits must be treated as a petition for a writ of habeas corpus with the attendant requirement that a plaintiff must exhaust his available State remedies pursuant to 28 U.S.C. § 2254 before presenting his claims to a Federal court. Defendants contend that this is such an action, even though the second amended complaint includes a prayer for damages and injunctive relief, which the defendants claim are "obviously tangential" to the "primary thrust of plaintiff's complaint," to secure his earlier relase from confinement. Plaintiff, who has been represented by counsel since the commencement of this action, contends that *Preiser* does not apply to that part of the complaint seeking damages and an injunction.

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With respect to good time, because of his prison disciplinary record, which, according to the defendants, is one of the worst ever compiled by a New York State prisoner, plaintiff's loss of good time as of the filing of the October 15, 1971 complaint was 1,915 days, which would have made him ineligible for conditional release until 1979. Had plaintiff received the same allowances as a model prisoner, on the other hand, he would have been eligible for conditional release on July 17, 1973. At present, plaintiff will be eligible for conditional release on February 22, 1975. This revised date was the result of a thorough review of plaintiff's disciplinary record in May, June, and early July, 1973, after which the Department of Correction in its discretion restored approximately 1,400 days of good time to plaintiff.

Preiser involved three New York State prisoners who were placed in segregation and deprived of good conduct time credits as a result of prison disciplinary proceedings. Each commenced a *pro se* action by filing a combined civil rights complaint and petition for habeas corpus relief. Alleging that they had been unconstitutionally deprived of the good-time credits, they sought an injunction to compel the restoration of the credits, which in each case would have resulted in their immediate release from confinement. The Supreme Court held:

> "[W]hen a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate or speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus." 411 U.S. at 500, 93 S.Ct. at 1841.

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In a footnote, Justice Stewart wrote for the Court:

> "If a prisoner seeks to attack both the conditions of his confinement and the fact or length of that confinement, his latter claim, under our decision today, is cognizable only in federal habeas corpus, with its attendant requirement of exhaustion of state remedies. But, consistent with our prior decisions, that holding in no way precludes him from simultaneously litigating in federal court, under § 1983, his claim relating to the conditions of his confinement." 411 U.S. at 499 n. 14, 93 S.Ct. at 1841.

Accordingly, insofar as the October 15, 1971 complaint seeks the restoration of good time, it is treated as a petition for a writ of habeas corpus, which must be denied for the failure of the plaintiff to exhaust his available State remedies.

[2, 3] With respect to plaintiff's claims for damages and an injunction—claims relating to the conditions of his confinement—the complaint must also be dismissed. Plaintiff complains of being placed in a segregation unit; of being confined on various occasions in a "strip cell" containing only a toilet, sink, and a bed; of being keeplocked; and of being disciplined for prison-rule infractions by loss of good time and recreation privileges. In addition, he alleges generally that he has been subjected to "a continuing course of harrassment [sic]" because he is a Black Muslim. These allegations are disputed by the defendants in the Spiegel affidavit dated October 2, 1973. Treating the allegations as true, however, it is nevertheless well settled that correctional authorities have wide discretion in matters of internal prison administration and that reasonable action within the scope of this discretion does not violate

a prisoner's constitutional rights. Christman v. Skinner, 468 F.2d 723, 725 (2d Cir. 1972); Sostre v. McGinnis, 334 F.2d 906, 908 (2d Cir.), cert. denied, 379 U.S. 892, 85 S.Ct. 168, 13 L.Ed.2d 96 (1964). *See* Smith v. Schneckloth, 414 F.2d 680, 681 (9th Cir. 1969), and cases cited therein. In Corby v. Conboy, 457 F.2d 251, 254 & n. 2 (2d Cir. 1972), for example, the Court of Appeals held that in view of this discretion accorded correctional authorities, claims of insufficient warm clothing, inadequate diet, poor lighting, lack of personal hygiene supplies and hot water, harassment, and discipline for refusal to accept employment—claims similar to those raised here—did not state a claim for which relief could be granted.

[4] Moreover, plaintiff has not alleged that the named defendants personally played any part in the alleged denials of his constitutional rights. As the court stated in Johnson v. Glick, 481 F.2d 1028, 1034 (2d Cir. 1973):

> "The rule in this circuit is that when monetary damages are sought under § 1983, the general doctrine of *respondeat superior* does not suffice and a showing of some personal responsibility of the defendant is required."

Thus, the complaint also lacks the required specificity to state a claim for damages under the Civil Rights Laws. See also Powell v. Jarvis, 460 F.2d 551, 553 (2d Cir. 1972).

Plaintiff's complaint does not include any allegations that the defendants prevented him from communicating with his attorneys or with the court or hindered him from preparing legal papers. See Corby v. Conboy, *supra*. And accepting the October 15, 1971 complaint's allegations as true, it does not appear that the plaintiff has been subjected to cruel or unusual punishment for his prison-rule infractions nor denied due process under the requirements

of Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971) (en banc), cert. denied sub nom., Sostre v. Oswald, 404 U.S. 1049, 92 S.Ct. 719, 30 L.Ed.2d 740 (1972). See Christman v. Skinner, 468 F.2d 723, 725 (2d Cir. 1972).

For the foregoing reasons, the complaint fails to state a cause of action. Since the pleadings and affidavits show that there is no issue of fact for trial, defendants' motion for summary judgment is granted.

[5] Plaintiff's motion for leave to add parties, to amend the complaint, and for summary judgment was made on October 30, 1973, just prior to the return date of the defendants' motion. The proposed amended complaint, also dated October 30, 1973, which would be the third amended complaint in this action, simply sets forth in greater detail what is contained in the October 15, 1971 complaint, and in addition it lists more recent instances of alleged mistreatment. It appears from the plaintiff's disciplinary record that he has not lost any good time as a result of these most recent incidents, for which the plaintiff has usually been keeplocked for short periods. In view of the prior three complaints and the dilatory prosecution of this action by plaintiff, the court will not delay this action's disposition further by permitting another complaint to be filed. Accordingly, plaintiff's motion for leave to add parties, to amend the complaint, and for summary judgment is denied.

Defendants may settle judgment on notice.

It is so ordered.